[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 82-1070

LEROY CHASSON,

Petitioner, Appellant,

v.

JOSEPH PONTE, ET AL.,

Respondent, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. A. David Mazzone, U.S. District Judge]

Before

Coffin, Chief Judge,

Rosenn,* Senior Circuit Judge,

and Breyer, Circuit Judge.

Robert L. Sheketoff, by appointment of the Court, with whom Zalkind, Zalkind & Sheketoff was on brief, for appellant.

Linda G. Katz, Assistant Attorney General, with whom Francis X. Bellotti, Attorney General, Stephen R. Delinsky, Chief, Criminal Bureau, and Barbara A.H. Smith, Assistant Attorney General, Chief, Criminal Appellate Division, were on brief, for appellees.

August 3, 1982

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*Of the Third Circuit, sitting by designation.

Per Curiam. Leroy Chasson appeals from a denial of his petition for a writ of habeas corpus. He is confined in a Massachusetts prison after having been convicted of first degree murder and a related crime. Commonwealth v. Chasson, 423 N.E.2d 306 (1981).

Chasson's main contention on this appeal is that the trial court erred in giving a "presumed intent" instruction. Chasson claims that such instruction has the effect of eliminating "intent" as an ingredient of the offense. See Sandstrom v. Montana, 442 U.S. 510 (1979). Accordingly, Chasson concludes that his trial lacked the "due process of law" that the federal constitution requires.

Before turning to the merits of Chasson's claim, we note that the Commonwealth now argues that the federal courts are foreclosed from considering that claim because Chasson did not object to the instruction at the time of trial. This failure to object arguably constitutes an adequate state ground upon which to rest the conviction, see Henry v. Mississippi, 379 U.S. 443 (1965), at least unless (1) there is a showing of "cause" for failing to object and consequent "prejudice," see Francis v. Henderson, 425 U.S. 536 (1976), or (2) the state courts have reviewed the federal claim on the merits anyway. See Wainwright v. Sykes, 433 U.S. 72 (1977). In this instance, the Massachusetts Supreme Judicial Court did consider Chasson's federal claim, but it did so under a special state statute, Mass. Gen. L. ch. 278, 33E, which specifies for murder cases that the Supreme Judicial Court shall review the "whole case." This "whole case" review involves greater discretion, claims the Commonwealth, than application of the federal "due process"

standard to the specific instruction. It is more like the "substantial miscarriage of justice" standard, which this court has considered a "limited relaxation of [the] . . . contemporaneous objection rule, . . . [in]sufficient to preclude the application of Wainwright." Zeigler v. Callahan, 659 F.2d 254, 271 n.11 (1st Cir. 1981). Be that as it may, the Commonwealth did not properly raise this argument in the trial court. And, we find no strong reason for granting an exception from the ordinary rule against raising new legal issues for the first time on appeal, see Nogueira v. United States, No. 81-1682 (1st Cir. July 19, 1982); United States v. Sachs, 679 F.2d 1015, 1018-19 (1st Cir. 1982). In any event, we believe the Commonwealth is correct on the merits of the constitutional claim.

The instruction to which Chasson objects is the following:

> So we have the words that must be discussed and their legal meanings explained to you; and even though the word does not appear in the statute I am going to charge you on intent, the word, "intent," because one is responsible for acts that he intends to do; and yet, because of our very nature as men and women, no one can be sure of what is in the mind of another person. Your intention, of course, is that which lies within the recesses of your mind. So how do we find intention?
>
> It is rather simple. When one does an unlawful act he is by the law presumed to have intended to do it and to have intended its ordinary and natural consequences on the ground that these must have been within his contemplation, if he is a sane man and acts with the deliberation which ought to govern men in the conduct of their affairs. So much for intent.

The question for us, as the Supreme Court has pointed out, is not whether this "instruction is undesirable, erroneous, or even universally condemned;" it is whether the "instruction by itself so infected the entire trial that the resulting

conviction violates due process," Cupp v. Naughton, 414 U.S. 141 (1973); Henderson v. Kibbe, 431 U.S. 145, 154 (1977). If read literally, it might be taken as telling the jury to presume that a person intends to do those things that he actually does only when he is "sane" and "acts with deliberation." But, the less literal reader or listener might well find the instruction confusing. Cf. Sandstrom v. Montana, 442 U.S. at 517. The Supreme Judicial Court wrote that it "was at best obscure," Commonwealth v. Chasson, 423 N.E.2d at 312. Chasson argues that it amounted to an instruction that relieved the jury from its duty to find intent beyond a reasonable doubt; and that it led the jurors to ignore his defense that he did not intend to kill anyone (which we take, roughly speaking, as a claim that he was confused in the scuffle that led to the killing).

We need not spend time determining precisely what this instruction meant, or might have been taken to mean, however, for in our view whatever false impression it may have given the jury about the law was cured by a later instruction. The trial judge told the jury that to find Chasson guilty of first degree murder, they had to find that "there was deliberate premeditation, . . . the prior formation of a purpose to kill." The trial court stated:

> [O]ur Courts have said that deliberate premeditation does not require any particular time. The word, "deliberately," in the phrase, "deliberately premeditated malice aforethought," refers to the prior formation of a purpose to kill rather than to any definite length of time. And upon evidence that there was a sequence of events, the jury can find or not find, depending upon your view, whether there was deliberate premeditation to do a certain act. It is not a matter of time. It can be long or short. It can be as short as it requires a person to make an intent, to intend to do something. And if he does that, it could be found by you, but it is for you to say whether it is deliberately premeditated.

The jury returned a verdict of guilty of first degree murder. It thus presumably considered this instruction and found deliberate premeditation. To find "premeditation"--under a correct, unchallenged instruction--is to find "intent" and more besides. Commonwealth v. Sheehan, 383 N.E.2d 1115, 1122 (Mass. 1978). Thus, whatever error the "intent" instruction contained could not have fatally undermined in any constitutional sense the fairness of the trial, "taken as a whole." Cf. United States v. Moccia, No. 81-1532, Slip Op. at 5 (1st Cir. June 16, 1982). As our brother Aldrich has remarked, "if there is a big hole in the fence for the big cat, need there be a small hole for the small one?" Polaroid Corporation v. Commissioner of Internal Revenue, 278 F.2d 148, 153 (1st Cir. 1960); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961). See United States v. Frady, 50 U.S.L.W. 4388, 4394 (April 6, 1982); United States v. Frady, 636 F.2d 506, 515-16 (D.C. Cir. 1980)(statement on denial of rehearing en banc by Judges Tamm, MacKinnon, Robb and Wilkey); United States v. Green, 424 F.2d 912, 913 (D.C. Cir. 1970), cert. denied, 400 U.S. 997 (1971). At least, the cat can't be hurt much by the small hole as long as the big one is nearby.

Chasson argues that the record before the district court was not sufficient to decide this question, and presumably others, that he raised. If we take this argument as one for reversal of the district court's denial of Chasson's motion to reproduce the entire state court record, we disagree. The district court has discretion in this matter. Rule 5 of the Rules Governing Cases in the United States District Courts Under 28 U.S.C. § 2254. As do we. Dickerson v. State of Alabama, 667 F.2d 1364, 1367 (11th Cir. 1982). Chasson's

counsel had complete access to the record; he was free to make particularized showings of need; instead, he rested on a general claim that the record would lead to greater enlightenment. The Commonwealth argued that no need for the entire record had been shown. We find no basis for requiring reproduction of the entire record, for we find no abuse of the trial court's discretion nor grounds for exercising our own. Chasson does not challenge the accuracy of the summary of the facts made by the Supreme Judicial Court. He fails to show what will be found in the transcripts that will augment the merits of his claim. See United States ex rel. Green v. Greer, 667 F.2d 585 (7th Cir. 1981).

If we take Chasson's argument as referring only to the jury charge, we still find no ground for reversal. Chasson did not specifically request the court to read the whole jury charge. He could readily have reproduced it. He does not now point to any absent portion that might be relevant to the issue at stake. Consequently, we find no good reason here to go beyond the excerpts quoted, delaying the case further in the absence of any convincing explanation of how additional documentation would help. Cf. Battie v. Estelle, 655 F.2d 692, 703 n.24 (5th Cir. 1981).

Finally, petitioner points to language in the district court's decision--"we have copies of the jury instructions"--and argues that the district court must have had papers that it did not show counsel. However, neither this language nor anything else in the opinion, suggests that the court had anything other than the instructions that counsel presented to him or that were quoted in the opinion of the state court.

For these reasons, the judgment of the district court is

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LEROY CHASSON, Petitioner

V.

JOSEPH PONTE, ET AL,
Respondents

Civil Action
81-1191-MA

MEMORANDUM AND ORDER

Mazzone, D.J.

January 7, 1982

Petitioner Leroy Chasson has filed a petition for a writ of habeas corpus under 28 U.S.C. §2254. On June 1, 1978, a jury in the Superior Court, Norfolk County, found him guilty of first degree murder and assault and battery by means of a dangerous weapon. The Massachusetts Supreme Judicial Court affirmed the conviction. Commonwealth v. Chasson, Mass. Adv. Sh. 724, 423 N.E. 306 (1981). He now seeks habeas relief on the basis of an allegedly erroneous trial ruling excluding certain evidence and an allegedly erroneous jury instruction. Petitioner has also moved to expand the record under Rule 5[1] of the Rules Governing Section 2254 Cases to include the state trial transcript. The defendant has filed a motion to dismiss.

For the purpose of reviewing this petition and the motion to dismiss, we accept the Supreme Judicial Court's statement of the evidence. Petitioner has not alleged any misstatement in the Court's opinion.

One night in August, 1977, a group of people in their twenties, including Kevin Racette, were present at Pageant Park in Quincy. They were drinking beer and other alcoholic beverages. Petitioner went to the park and spoke to some members of the group. He left and returned twenty minutes later in order, as he admitted at trial, to "punch him out," referring to Racette, against whom he had a grievance. There is evidence upon which a jury could find that the petitioner was carrying a knife when he returned. Upon

1. Rule 7 would also appear to be an appropriate rule for expansion of the record.

arriving, Chasson drew Racette aside, hit him and a scuffle ensued. Several witnesses saw Chasson "punch" one person who, it soon became apparent, had received serious cuts from which he died. The petitioner also stabbed another individual when that individual attempted to intervene.

After the stabbings, Chasson left the park, and went to Maine. He was arrested there a week later. A knife was found nearby where he was arrested.

Petitioner's version is that he returned to the park to attack Racette, but was not carrying a knife. During the scuffle which ensued, he saw "a couple of flashes," and picked up a knife in self-defense. He says that he threw the knife away as he was leaving the park after the incident.

I.

Petitioner has moved to expand the record under Rule 5 of the rules in habeas corpus proceedings. Rule 5 (and Rule 7) is discretionary. It provides that the judge may order or direct additional materials to be furnished where needed to determine the merits of the petition. An expanded record is useful where the petitioner is proceeding pro se or where the government has not replied. See Haines v. Kerner, 404 U.S. 519 (1972); Raines v. United States, 423 F.2d 526, 529-530 (4th Cir. 1970).

Here, however, we have a memorandum filed by petitioner's attorney, one filed by the Commonwealth and a copy of the opinion of the Supreme Judicial Court, whose recitation of the facts petitioner has not challenged. In fact, the petitioner has alleged no additional facts which would necessitate reproduction of the record. We have copies of the jury instructions and are aware of the circumstances under which the trial court excluded the subject evidence.

For our purposes the record is complete. Not additional facts, but the legal effect of the "facts" is all that is required in order to decide the Commonwealth's motion to dismiss. Therefore, the petitioner's motion to expand the record is denied.

II.

The first ground upon which petitioner claims relief was the trial court's ruling excluding two knives found later at the park. To merit habeas corpus relief, the petitioner must show not only that the ruling was erroneous, but that he was severely prejudiced. Habeas relief is not available "solely on the basis of alleged error in evidentiary rulings." Salemme v. Ristaino, 587 F.2d 81 (1978). See also Allen v. Snow, 635 F.2d 12 (1980), cert. denied, 101 S.Ct. (1981) (such error must so infuse a trial with inflammatory prejudice as to render a fair trial impossible) (quoting Salemme, supra, at 586). It is only where "there is a denial of fundamental fairness that habeas should be granted." Anderson v. Maggio, 555 F.2d 447 (5th Cir. 1977).

The first knife was a small steak knife found sticking in the underside of the park's pavilion roof two and a half weeks after the stabbings. The second was a folding jackknife found against the edge of the raised cement floor of that same pavilion. It was discovered a month and a half after the incident. Tests revealed traces of either human or animal blood on the steak knife and no blood traces on the jackknife. At an extensive voir dire, evidence showed that three exhaustive searches of the area had taken place after the stabbings and no knife was found. It was also shown that large numbers of people used the area in summer as a picnic area.

Petitioner asserts that the introduction of these knives would have supported his version of the night's events that knives were plentiful at the park. Conceivably, then, petitioner could have arrived without a knife and picked one up during the fight. Moreover, he claims to have thrown the knife away as he departed.

The connection between the knives and petitioner's theory of his defense is tenuous at best. There is no evidence linking the knives to the stabbings other than the

fact that they were found in the park where the stabbings occurred 2 1/2 weeks and a month and a half later. It was within the trial court's discretion to consider the remoteness in time in deciding whether the evidence was admissible. Given the circumstances, it cannot be said that the exclusion resulted in fundamental unfairness.

III.

Petitioner also challenged the trial court's "presumed intent" jury instruction as unconstitutional under the principles of Sandstrom v. Montana, 442 U.S. 510 (1979). The trial court gave the following instruction on the element of intent.

> So we have the words that must be discussed and their legal meanings explained to you; and even though the word does not appear in the statute I am going to charge you on intent, the word, "intent," because one is responsible for acts that he intends to do; and yet, because of our very nature as men and women, no one can be sure of what is in the mind of another person. Your intention, of course, is that which lies within the recesses of your mind. So how do we find intention?
>
> It is rather simple. When one does an unlawful act he is by the law presumed to have intended to do it and to have intended its ordinary and natural consequences on the ground that these must have been within his contemplation, if he is a sane man and acts with the deliberation which ought to govern men in the conduct of their affairs. So much for intent. Tr. 11-83-84. 1/

In Sandstrom the court found that a jury instruction which states that "the law presumes that a person intends the ordinary consequences of his voluntary act" violates the Fourteenth Amendment's requirement that the State prove every element beyond a reasonable doubt. The court stated the test as "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom, supra, at 515.

The rule in this Circuit is that it is always error to instruct that a person is presumed to intend the natural and probable consequences of his acts. United States v. Winter, Slip Op. No. 79-1437 (Oct. 31, 1981). Winter also establishes that the error can be considered harmless if it is ill-suited

to both the theory on which the case is tried and the evidence presented.

Under these guidelines, the instruction here did not violate the petitioner's constitutional rights. A reasonable juror would not have interpreted the instruction as shifting the burden of the defense to him. Moreover, petitioner's challenge is not suited to his version of the events.

The jury convicted petitioner of first degree murder. The first degree murder instruction required the jury to find that he acted with "deliberate premeditation." The court instructed:

> The word, "deliberately"...refers to the prior formation of a purpose to kill rather than to any definite length of time. And upon evidence that there was a sequence of events, the jury can find or not find depending upon your view, whether there was deliberate premeditation to do a certain act. It is not a matter of time. It can be long or short. It can be as short as it requires a person to make an intent, to intend to do something. And if he does that, it could be found by you, but it is for you to say whether it is deliberately premeditated. (emphasis added)

Clearly a reasonable juror would know that a finding that he "intended" to kill would not be enough to convict the defendant of first degree murder. The trial court made it apparent that the jury had to decide that Chasson acted with "deliberate premeditation," an element which differed from "intent." Moreover, the fact that the court also instructed on the elements of second degree murder, manslaughter and involuntary manslaughter, as well as self-defense, shows that a reasonable juror would understand the varying degrees of intent that the Commonwealth would have to prove. The situation here is unlike that in Sandstrom where the jurors "were not told they had a choice." Supra, at 515.

We find therefore that the intent instruction did not violate petitioner's due process rights to have the state prove its case against him.

Moreover, under the Winter criteria, the petitioner's challenge to the jury instruction is not pertinent to his version of the events. He did not claim that he did not

intend to stab the victims. His claim was that he was defending himself and that his actions were justified. See Hollway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 49 U.S.L.W. 38881 (May 26, 1981) (defendant did not claim that he did not intend to shoot the victim but that the homicide was justified). Cited in Winter, supra, at 44.

The court instructed that first degree murder requires a finding of "deliberately premeditated malice aforethought." "Malice" was defined as a killing done with the intent to inflict serious injury without legal justification or mitigating circumstances." The court also charged on deliberate premeditation adding that "[t]he law permits the jury to infer the existence of malice from the fact of an intentional killing, coupled with an implied negation of any excuse of justification." The jury could have found that the petitioner intended the natural consequences of his act but that he acted to protect himself.

On the facts of this case, therefore, the challenged jury instruction did not violate petitioner's constitutional rights.

Conclusion

In accordance with the above, the respondent's motion to dismiss is granted.

SO ORDERED.

A. David Mazzone
United States District Judge

COMMONWEALTH

v.

Leroy CHASSON.

Supreme Judicial Court of Massachusetts, Norfolk.

Argued Dec. 2, 1980.

Decided March 18, 1981.

The Superior Court, Norfolk County, McGuire, J., found defendant guilty of murder in first degree and assault and battery by means of dangerous weapon, and defendant appealed. The Supreme Judicial Court, Wilkins, J., held that: (1) permitting victim's mother to testify was not an abuse of discretion; (2) exclusion of certain evidence and cross-examination was not error; and (3) instructions were not erroneous.

Affirmed.

1. Criminal Law ⇐338(7)

Trial judge did not abuse his discretion in permitting homicide victim's mother to testify.

2. Criminal Law ⇐338(7)

Where testimony of close relative is redundant and of minimum materiality and where there is reasonable prospect that jury would be prejudiced, reviewing court would find no fault with determination to exclude such evidence.

3. Criminal Law ⇐783

Where prosecutor was warranted in anticipating witness's testimony as he did, prosecutor did not act improperly in stating certain anticipated testimony in his opening statement to jury, even though witness did not testify as expected.

4. Criminal Law ⇐338(1)

Whether evidence is legally relevant is question which is generally left to discretion of trial judge.

5. Criminal Law ⇐384

Proximity to crime in point of time is element which judge in his discretion may consider in viewing probative value of evidence.

6. Criminal Law ⇐404(4)

Where defendant offered no evidence linking particular knives to stabbing incident other than their presence in park two and a half weeks and a month and a half, respectively, after stabbings occurred in park, trial court did not err in excluding knives from evidence even though defendant argued that admissibility supported his theory that he did not use knife already in his possession but picked up knife which fell to ground during fight and later threw it out of car as he was leaving park.

7. Witnesses ⇐282½

Where subject was adequately developed in other questioning, there was no error in exclusion of questions asked on cross-examination of Commonwealth's witnesses.

8. Witnesses ⇐270(2)

Where defendant made no showing as to relevancy, judge did not abuse his discretion in excluding question which was propounded to witness on cross-examination and which inquired as to whether witness had conversation just before victims were stabbed.

9. Homicide ⇐300(3)

Judge's charge on self-defense was not inadequate.

10. Criminal Law ⇐834(2)

Judge is not bound to instruct in exact language of particular requests for instructions.

11. Criminal Law ⇐782(7)

Judge need not instruct on every subsidiary fact and possible inference.

12. Homicide ⇐325

Where there was no objection to such charge, adequacy of charge on deliberate premeditation would be considered only under statute relating to review in capital case. M.G.L.A. c. 278, § 33E.

13. Homicide ⇐286(3)

Judge's definition of deliberate premeditation as "the prior formation of a purpose to kill" was not error.

14. Homicide ⇐294(2)

Where defendant charged with murder did not rely on such theory, did not request instruction based on such theory, and evidence did not warrant giving such instruction, instruction that intoxication could render person mentally incapable of premeditation was not required.

15. Homicide ⇐325

In reviewing case pursuant to statute relating to review in capital cases, court would review claims that particular charges unconstitutionally misstated degree of proof required even though no objection was made to charge. M.G.L.A. c. 278, § 33E.

16. Homicide ⇐325

In absence of objection, standard of review under statute relating to review in capital cases is broader than standard of review in other circumstances.

17. Criminal Law ⇐1134(7)

On writ of error seeking postconviction relief, reviewing court would apply substantial risk of miscarriage of justice standard but would not permit writ of error to raise claim whose constitutional significance was developed before defendant's trial or appeal.

18. Criminal Law ⇐822(1)

Reviewing court would consider charge as a whole to see whether effect of erroneous instruction was mitigated by other language in charge.

19. Assault and Battery ⇐49

Conviction of assault and battery requires finding of intentional striking of victim.

20. Criminal Law ⇐822(11)

In light of charge as a whole, court's statement that one who does unlawful act is presumed to have intended to do it and to have intended its ordinary and natural consequences did not eliminate intent as ingredient of offense by creating conclusive presumption that defendant intended to kill with malice of forethought and deliberate premeditation.

21. Homicide ⇐253(1)

Record sustained first-degree murder conviction of defendant who claimed he acted in self-defense but who sought to punch out one party, knifed two bystanders one of whom died, and fled jurisdiction.

Robert L. Shekstoff, Boston, for defendant.

Charles J. Hely, Asst. Dist. Atty., for the Commonwealth.

Before HENNESSEY, C. J., and BRAUCHER, KAPLAN, WILKINS and ABRAMS, JJ.

WILKINS, Justice.

The defendant appeals from his conviction of murder in the first degree of one Paul Melody and his conviction of assault and battery by means of a dangerous weapon, on one Robert Hayward. We affirm the convictions, and, as to the murder conviction, we have performed our duty under G.L. c. 278, § 33E, and conclude that neither a new trial is warranted nor the entry of a verdict of a lesser degree of guilt.

We outline the evidence in general. The defendant stabbed Melody and Hayward in Pageant Park in Quincy on a warm night in August, 1977. There were a number of people in their twenties present at a gathering in the park, where they were drinking beer or other alcoholic beverages. One of these people was Kevin Racette against whom the defendant had a grievance. The defendant, driven there by a friend, came to the park and spoke with some members of the group. He left and returned about twenty minutes later. The defendant drew Racette aside and hit him in the face. A scuffle developed. The defendant had a knife in his hand, and there was evidence that would have warranted the jury to conclude that the defendant arrived at the

park with that knife. Several witnesses saw the defendant "punch" Melody, who it soon became apparent had received the serious cuts from which he died shortly afterward. The defendant stabbed Hayward twice in the kidney area when Hayward attempted to intervene. The defendant was driven away from the park. He was arrested in Maine a week later. A knife was found near where he was arrested.

The defendant testified at considerable variance with this evidence. He admitted that he returned to the park to attack Racette but claimed that he did not bring a knife with him. He said that, after he punched Racette, people came after him and that, in the melee, he picked up a knife from the ground and tried to defend himself. He said that he had the knife in his hand when he got into the car to leave the park but that, as the car backed out of the parking lot, he threw the knife out of the window.

With this brief background, we consider the various points raised by the defendant's appeal, which has been brought through counsel other than his trial counsel. Some of the points argued were the subject of objection below. Others were not.

[1, 2] 1. The judge did not abuse his discretion in permitting the victim's mother to testify. At the defendant's request, the judge held a bench conference to determine what the witness was to testify about. Her testimony covers less than three pages of the transcript and no prejudice appears in that testimony apart from the possible prejudice produced by reason of the witness being the victim's mother. The defendant did not object to any question on the ground of relevancy or materiality. The Commonwealth was entitled to introduce relevant evidence through this witness, even though none of her testimony was essential to the Commonwealth's case. See *Commonwealth v. Chung*, 378 Mass. 451, —— n.1[a], 392 N.E.2d 1015 (1979); *Commonwealth v. Nassar*, 354 Mass. 249, 257-258, 237 N.E.2d 39 (1968), cert. denied, 393 U.S. 1039, 89 S.Ct. 662, 21 L.Ed.2d 586 (1969). Testimony from a victim's close relative might have a prejudicial effect on the jury. The judge was well aware of that risk and controlled the scope of the prosecutor's questions. Where the testimony of a close relative is redundant and of minimum materiality and where there is a reasonable prospect that the jury would be prejudiced, we would find no fault with a determination to exclude such evidence. It is, of course, within the power of prosecutors to avoid the possibility of prejudice simply by not presenting the witness. Here, however, the judge did not abuse his discretion in permitting Melody's mother to testify.

[3] 2. The claim that, in his opening to the jury, the prosecutor acted improperly in stating certain anticipated testimony is without substance. There was no exception taken on this point at any time, and it is presented to us for consideration pursuant to our duty under G.L. c. 278, § 33E. The record, expanded on motion of the Commonwealth, shows that the prosecutor was fully warranted in anticipating the witness's testimony as he did. It is true that the witness did not testify as expected. However, the defendant himself admitted to making substantially the same statement as it was expected the witness would attribute to the defendant.

3. The defendant claims reversible error in the exclusion from evidence of two knives. The first was a small steak knife found sticking into the underside of the pavilion roof at Pageant Field, approximately two and a half weeks after the stabbings. The second was a folding jackknife with a corrosion spotted blade found close to a month and a half after the stabbings, lying against the edge of the raised cement floor of the pavilion area. Tests revealed traces of either human or animal blood on the steak knife and no blood traces on the jackknife.

The defendant argued for the admissibility of the knives on the ground that they supported the theory that the defendant did

a. Mass.Adv.Sh. (1979) 1722, 1723 n.1.

not use a knife already in his possession at the time of the stabbings but that he picked up a knife which fell to the ground during the fight and later threw it out of the car as he was leaving the park. He also argued that the knives supported the theory that there were knives present during the incident other than the one the defendant wielded. After an extensive voir dire, the judge ruled that the knives were inadmissible.

The evidence at the voir dire showed that, soon after the stabbings, police conducted three separate searches of the pavilion area where the two knives were later found. The third search in particular was exhaustive, involving ten or twelve police officers and thirty to forty assistants who swept the area three times in a closely knit formation in search of a knife or other sharp instrument. In none of the searches was any knife found. Additional evidence indicated that the pavilion was a picnic area and was used by large numbers of people in the late summer.

[4, 5] Whether evidence is legally relevant is a question which is generally left to the discretion of the trial judge. *Commonwealth v. Watkins*, 375 Mass. 472, 491, 379 N.E.2d 1040 (1978). *Commonwealth v. Burke*, 339 Mass. 521, 533-534, 159 N.E.2d 856 (1959). W.B. Leach & P.J. Liacos, Massachusetts Evidence 283 (4th ed. 1967). The proximity to the crime in point of time is an element which the judge in his discretion may consider in viewing the probative value of evidence. *Commonwealth v. Watkins*, *supra*. *Aldrich v. Aldrich*, 215 Mass. 164, 168, 102 N.E.2d 487 (1913). *Commonwealth v. Berger*, — Mass.App. —, —[b], 398 N.E.2d 505 (1980).

[6] The defendant offered no evidence linking the particular knives to the stabbing incident other than their presence in the park two and a half weeks and a month and a half, respectively, after the stabbings. We think that this lack of linking evidence, together with what was in the circumstances a significant passage of time, provided sufficient grounds for the judge in his discretion to exclude them as lacking probative value.

[7, 8] 4. There was no error in the exclusion of questions asked on cross-examination of three Commonwealth witnesses. In two instances, the subject was adequately developed in other questioning. In the third instance, the witness was asked whether she had a conversation, just before the victims were stabbed, about what she thought might happen. The relevancy of what she thought or what was said about what she thought was not apparent, and defense counsel made no attempt to make it apparent. The judge did not abuse his discretion in excluding these three questions.

[9-11] 5. There is no merit to the defendant's claim that the judge's charge on self-defense was inadequate. He contends that the judge should have made explicit reference to specific facts on which the defendant based his self-defense argument. The judge is not bound to instruct in the exact language of particular requests for instructions. *Commonwealth v. Edmonds*, 365 Mass. 496, 506, 313 N.E.2d 429 (1974). He need not instruct on every subsidiary fact and possible inference. *Commonwealth v. Therrien*, 371 Mass. 203, 206, 355 N.E.2d 913 (1976). Reading the instructions as a whole, they were not misleading, and they fairly permitted the jury to consider the defendant's self-defense contention. *Commonwealth v. Shaffer*, 367 Mass. 508, 513, 326 N.E.2d 880 (1975). *Commonwealth v. Benders*, 361 Mass. 704, 707, 282 N.E.2d 405 (1972).

[12-14] 6. The defendant challenges the adequacy of the judge's charge on deliberate premeditation. Because there was no objection to the charge in this respect, we consider the matter only under G.L. c. 278, § 33E. There was no error in any event. Deliberate premeditation was clearly set forth as a separate element which had to be proved in addition to malice aforethought in order to support a verdict of murder in the first degree. The judge's definition of de-

b. Mass.App.Ct.Adv.Sh. (1980) 28, 29.

liberate premeditation as "the prior formation of a purpose to kill" was consistent with other formulations in our opinions. See *Commonwealth v. Blaikie*, 375 Mass. 601, 605, 378 N.E.2d 1361 (1978), *Commonwealth v. McLaughlin*, 352 Mass. 218, 230, 224 N.E.2d 444, cert. denied, 389 U.S. 916, 88 S.Ct. 250, 19 L.Ed.2d 268 (1967). We have never required that any specific form of words be spoken.[1]

7. The defendant argues that the judge's charge eliminated intent as an ingredient of the offense by creating a conclusive presumption that the defendant intended to kill with malice aforethought and deliberate premeditation. He reads the charge as improperly telling the jury that the law presumes that a person intends the ordinary and natural consequences of his acts. Trial counsel did not object to the judge's charge in this respect.

[15–17] As we have noted, this case is before us for review under G.L. c. 278, § 33E. Under § 33E, even in the absence of an objection to a charge, we have reviewed defendants' claims that particular charges unconstitutionally misstated the degree of proof required of the Commonwealth. See *Commonwealth v. Callahan*, — Mass. —, — [2], 406 N.E.2d 385 (1980); *Commonwealth v. Collins*, 374 Mass. 596, 597, 599, 373 N.E.2d 969 (1978).[3] We have said that, if the constitutional principles on which a claim is based had been developed at the time of the jury charge, we would bring greater expectations to the judge's charge and would expect more of counsel as well in raising an appropriate objection. See *Commonwealth v. Callahan*, — Mass. —, — — [4], 406 N.E.2d 385 (1980); *Commonwealth v. Medina*, — Mass. —, — n.5 [c], 404 N.E.2d 1228 (1980); *Commonwealth v. Collins*, 374 Mass. 596, 599, 373 N.E.2d 969 (1978). In practice, however, we have not visited on a defendant, in a direct appeal, his counsel's failure to object to a constitutionally deficient charge concerning the degree of proof required of the Commonwealth. The problem presented by the jury charge, as claimed before us, was anticipated to some degree by opinions which came down before the trial,[5] but the specific point

1. The defendant suggests that the judge erred in failing to instruct that intoxication could render a person mentally incapable of premeditation. *Commonwealth v. Cobb*, — Mass. — , — (Mass.Adv.Sh. [1980] 59, 69), 405 N.E.2d 97, vacated on other grounds sub nom. *Massachusetts v. Hurley*, 449 U.S. 809, 101 S.Ct. 56, 66 L.Ed.2d 12 (1980). No such instruction was required where the defendant did not rely on this theory, did not request an instruction based on it, and the evidence did not warrant the giving of such an instruction.

[c] Mass.Adv.Sh. (1980) 1411, 1412.

2. In the absence of objection, the standard of review under § 33E is broader than the standard of review in other circumstances. See *Commonwealth v. Cole*, — Mass. —, — (Mass.Adv.Sh. [1980] 583, 591), 402 N.E.2d 55 (1980). In cases not reviewed under § 33E, the test on direct appeal is whether there is "a substantial risk of miscarriage of justice." *Commonwealth v. Hughes*, — Mass. —, — (Mass.Adv.Sh. [1980] 1175, 1180), 404 N.E.2d 1246 (1980). In such a case, the fact that defects of the type claimed in a charge had been disclosed by our previous opinions and counsel made no relevant objection to the charge might suggest that the defects in the charge were not thought to be critical. *Id.* On a writ of error seeking postconviction relief, we would also apply the "substantial risk of miscarriage of justice" standard (*Gibson v. Commonwealth*, 377 Mass. 338, — n. — [Mass.Adv.Sh. (1979) 692, 694-695]), 387 N.E.2d 123 (1979) but would not permit a writ of error to raise a claim whose constitutional significance was developed before a defendant's trial or appeal (*DeJoinville v. Commonwealth*, — Mass. —, — [Mass.Adv.Sh. (1980) 1797, 1799]), 406 N.E.2d 1353 (1980).

[d] Mass.Adv.Sh. (1980) 1411, 1415-1416.

[e] Mass.Adv.Sh. (1980) 1143, 1155 n.5.

3. Prior to the defendant's trial in May, 1978, we had had occasion to deal with arguments challenging references to presumptions, as opposed to reasonable inferences, in jury charges concerning the proof of a case against a criminal defendant. See, e.g., *Commonwealth v. McInerney*, 373 Mass. 136, 149-150, 365 N.E.2d 815 (July 28, 1977); *Commonwealth v. Johnson*, 372 Mass. 185, 192, 361 N.E.2d 212 (March 18, 1977). Approximately two months before trial, we specifically noted that a judge must exercise caution in phrasing references to conclusions that a jury might properly draw from a defendant's conduct. See *Commonwealth v. Collins*, 374 Mass. 596, 600-601 n.2, 373 N.E.2d

argued was not fully dealt with in any opinion of this court until *Commonwealth v. Callahan*, — Mass. —[f], 406 N.E.2d 385 (1980). Moreover, *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (June 29, 1978), and *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (June 18, 1979), were decided after the May, 1978, trial in this case. It is the *Sandstrom* opinion that sets forth the theory on which the defendant relies. See *DeJoinville v. Commonwealth*, — Mass. —, —[g], 408 N.E.2d 1353 (1980).

[18] We have reversed murder convictions where the judge charged in effect that a person was presumed to have intended the natural or probable consequences of his voluntary acts. See *Commonwealth v. Callahan*, — Mass. —, —[h], 406 N.E.2d 385 (1980); *DeJoinville v. Commonwealth*, — Mass. —, —[i], 408 N.E.2d 1353 (1980) (post conviction relief). We will consider a charge as a whole, however, to see whether the effect of an erroneous instruction was mitigated by other language in the charge. See, e. g., *Commonwealth v. Fitzgerald*, — Mass. —, —[j], 406 N.E.2d 389 (1980); *Commonwealth v. Hughes*, — Mass. —, —[k], 404 N.E.2d 1246 (1980); *Commonwealth v. Medina*, — Mass. —, —[l], 404 N.E.2d 1228 (1980); *Gibson v. Commonwealth*, 377 Mass. 539, —[m], 387 N.E.2d 123 (1979); *Commonwealth v. McInerney*, 373 Mass. 136, 150–151, 365 N.E.2d 815 (1977). This court, in conducting a G.L. c. 278, § 33E, review, has also considered whether a constitutionally deficient charge was nevertheless harmless error. See *Commonwealth v. Garcia*, — Mass. —, —[n], 399 N.E.2d 460 (1980); Cf. *Commonwealth v. Hughes*, — Mass. —, —[o], 404 N.E.2d 1246 (1980) (review under the "substantial risk of a miscarriage of justice" standard).

[19] We come then to analyze the judge's charge which we summarize in pertinent part. The judge charged that the defendant "is presumed to be innocent until he is proven guilty beyond a reasonable doubt on all the essential elements of the crimes charged." He then expanded on the presumption of innocence and the burden of proof placed on the Commonwealth. He next charged extensively, in unexceptionable language, on the meaning of reasonable doubt. He defined assault and battery in language that the defendant does not challenge.[4]

969 (March 9, 1978), in which we said: "[A]t one point in the instructions the judge stated to the jury the traditional instruction that a person may be held to intend the natural and probable consequences of his conduct and that the jury might be warranted in inferring malice from the use of a deadly weapon. The words chosen by the judge came perilously close to establishing a presumption in favor of the Commonwealth which the defendant must overcome. Such presumptions residing in the State law give rise to the *Mullaney* [*v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)] and *Hankerson* [*v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977)] holdings, and indicate the caution which is needed in phrasing such concepts."

f. Mass.Adv.Sh. (1980) 1411.

g. Mass.Adv.Sh. (1980) 1797, 1801.

h. Mass.Adv.Sh. (1980) 1411, 1414–1415.

i. Mass.Adv.Sh. (1980) 1797, 1805–1806.

j. Mass.Adv.Sh. (1980) 1433, 1437–1439.

k. Mass.Adv.Sh. (1980) 1175, 1181–1182.

l. Mass.Adv.Sh. (1980) 1143, 1154–1156.

m. Mass.Adv.Sh. (1979) 692, 695–698.

n. Mass.Adv.Sh. (1980) 21, 40–41.

o. Mass.Adv.Sh. (1980) 1175, 1180.

4. The charge on assault and battery had a bearing on each of the indictments before the jury. A conviction of assault and battery requires a finding of an intentional striking of the victim. *Commonwealth v. Campbell*, 352 Mass. 387, 397, 226 N.E.2d 211 (1967). As applied to the case before the jury, the question of an intentional striking was not a paramount issue because the defendant in effect conceded that he struck the victims with a knife but argued that he acted in self-defense or at least on reasonable provocation.

The judge read from G.L. c. 265, § 1, distinguishing between murder in the first degree and murder in the second degree. He then discussed intent in the following language:

"So we have the words that must be discussed and their legal meanings explained to you; and even though the word does not appear in the statute I am going to charge you on intent, the word, 'intent,' because one is responsible for acts that he intends to do; and yet, because of our very nature as men and women, no one can be sure of what is in the mind of another person. Your intention, of course, is that which lies within the recesses of your mind. So how do we find intention?

"It is rather simple. When one does an unlawful act he is by the law presumed to have intended to do it and to have intended its ordinary and natural consequences on the ground that these must have been within his contemplation, if he is a sane man and acts with the deliberation which ought to govern men in the conduct of their affairs. So much for intent."

The judge next charged on the definition of murder in the first degree, murder in the second degree, and manslaughter. He said that malice means "a killing done with the intent to inflict serious injury without legal justification or mitigating circumstances." He further charged twice that "[m]alice in murder means a knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow a contemplated act." He charged on deliberate premeditation. He added that "[t]he law permits the jury to infer the existence of malice from the fact of an intentional killing, coupled with an implied negation of any excuse or justification." This language permitted an inference of malice, but did not presume malice, from an intentional killing. The judge concluded with a charge on voluntary manslaughter and self-defense. The matter of self-defense was crucial to the defendant's contention at trial, both in his own testimony and in his counsel's argument to the jury. The charge on self-defense in no way involved any permissible inference or presumption concerning the defendant's intention.

We return then to the specific portion of the judge's charge on intent to which the defendant objects. It is repeated in the margin.[5] This is not a straightforward charge of the character with which we have been concerned recently: that a person is presumed to intend the natural and probable consequences of his acts. See *DeJoinville v. Commonwealth*, *supra*; *Commonwealth v. Callahan*, *supra*. The instruction refers not to all acts but only to *unlawful* acts. For this charge to have any application, the jury would have had to have determined, following other portions of the judge's charge, that the defendant's acts were unlawful. Moreover, whatever the presumption described by the judge meant, he said that it applied only if the defendant acted "with the deliberation which ought to govern men in the conduct of their affairs." Consequently, the defendant was to be held to the ordinary and natural consequences of his unlawful conduct only if the jury found that he was acting with reasonable deliberation. This limitation substantially negated the stated presumption and opened up the question of the defendant's state of mind for determination by the jury according to other portions of the judge's charge.

[20] The judge's charge in its challenged portion was hardly a picture of clarity. It was at best obscure. It may in fact have told the jury nothing which could be of assistance to them. It differs from the erroneous but intelligible charges concerning mandatory presumptions which we have found constitutionally deficient. Because the jury found deliberate premeditation on a proper charge on that question, the possibility is substantially mitigated that the

5. "When one does an unlawful act he is by the law presumed to have intended to do it and to have intended its ordinary and natural consequences on the ground that these must have been within his contemplation, if he is a sane man and acts with the deliberation which ought to govern men in the conduct of their affairs. So much for intent."

challenged language improperly influenced the jury in arriving at its verdict. Considered as part of the entire charge in the context of this case, the challenged language could not reasonably have been understood by the jury, if it was understandable at all, as shifting the burden of proof from the Commonwealth or as creating a constitutionally impermissible presumption.[6]

[21] 8. Relief under G.L. c. 278, § 33E, is not appropriate in this case. We have found no prejudicial error in any of the legal points advanced on appeal. The defendant makes no separate argument that we should direct the entry of a verdict that the defendant was guilty of a lesser offense. This was not the "typical" drunken brawl in which someone suddenly and impulsively pulled a knife. In such a case, a conviction of murder in the first degree might not be the expected one. The incident here had no benign origin. The defendant testified that he sought out Racette to "punch him out" because Racette had "ripped off" a close friend of the defendant while in prison. The defendant calculatingly attacked one person, knifed two bystanders against whom he had no grievance, did not surrender to the police as a person who acted in self-defense might be expected to do, and fled the jurisdiction. The conviction of murder in the first degree should stand.

Judgments affirmed.

6. In any event, the charge had no bearing on the defendant's conviction of assault and battery with a dangerous weapon on the victim who survived.

Marjorie G. HEISTAND

v.

Peter J. HEISTAND.

Supreme Judicial Court of Massachusetts, Norfolk.

Argued March 4, 1981.

Decided July 2, 1981.

Ex-husband appealed from decision of the Probate Court, Norfolk County, Dolan, J., which held him in contempt and ordered upward modification of child support awarded in divorce judgment. The Supreme Judicial Court, Liacos, J., held that: (1) ex-husband was not entitled to reimbursement for alimony paid from date of ex-wife's so-called remarriage ceremony while she was still married to ex-husband to date of legal remarriage; (2) ex-wife was entitled to upward modification of child support; (3) trial court did not abuse discretion in permitting ex-wife's late amendment of modification complaint; and (4) ex-husband was not entitled to offset amount from weekly payments to ex-wife under divorce judgment in order to collect money due for tax liability of ex-wife.

Affirmed.

1. Divorce ⇨247

Ex-husband was not entitled to reimbursement for alimony he allegedly overpaid from date of wife's so-called remarriage while she was still married to defendant to date of legal remarriage where ceremony was a legal nullity in the commonwealth, ex-husband adduced no evidence that ex-wife's purported husband assumed obligation to support her between date of nullified marriage and date of legal marriage and, even though ex-husband had knowledge of nullified marriage, he continued to pay weekly alimony.